

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the matter of

Closed Captioning and Video Description  
of Video Programming

**CS Docket No. 95-176**

**PETITION FOR RECONSIDERATION**

**Association of Local Television Stations, Inc.**  
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October 16, 1997

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The Association of Local Television Stations, Inc. ("ALTV"), hereby submits its petition for reconsideration of the Commission's *Report and Order* in the above-captioned proceeding.<sup>1</sup> ALTV is a non-profit, incorporated association of broadcast television stations unaffiliated with the ABC, CBS, or NBC television networks.<sup>2</sup> ALTV's member stations will be affected directly by the new captioning rules. Indeed, inasmuch as they rely less substantially on network-supplied programming, they will be affected more quickly and significantly at the local station level than stations affiliated with ABC, CBS, and NBC. The minor revisions and clarifications sought herein will go far to preserve their programming discretion as the new rules come into full effect.

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<sup>1</sup>FCC 97-279 (released August 22, 1997), 62 *Fed. Reg.* 48487 (September 16, 1997)[hereinafter cited as *Report and Order*].

<sup>2</sup>Local stations among ALTV's members include not only traditional independent stations, but also local television stations affiliated with the three emerging networks, Fox, UPN, and WB. As used herein, the term "local television stations" includes ALTV member stations, but excludes affiliates of ABC, CBS, and NBC.

## **I. INTRODUCTION AND SUMMARY**

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ALTV initially applauds the Commission for crafting rules which successfully navigate the tortuous path between the competing statutory goals of maximizing the availability of television programming to persons with hearing disabilities and of avoiding undue burdens on local television stations. Generally speaking, the Commission has structured a regulatory regime and timetable which is realistic and achievable. ALTV remains concerned, however, that to a limited extent, the rules still may tend to straitjacket local television stations' programming and editorial discretion. To alleviate these concerns and attenuate undue incursions into stations' basic programming and editorial decisions, ALTV herein seeks several minor modifications of the Commission's new rules, as well as clarification of several aspects of the requirements.<sup>3</sup>

First, ALTV urges the Commission to allow some flexibility in the requirement that stations maintain the current level of captioning. This requirement may subject stations' immediate programming decisions to the need to comply with the captioning requirements rather than the licensees' judgment about what programming is most responsive to local community demand. Therefore, this requirement should be eliminated or, at least, tempered.

Second, some clarification is necessary with respect to the exemption for locally-produced programming. The Commission should clarify that repeats or reruns of locally-produced programs on the same station, an LMA'd station, or commonly owned station will not defeat the exemption. Similarly, such pure public interest programs as candidates' debates and charitable

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<sup>3</sup>ALTV submits that stations should have a clear idea of what is required by the new rules. To aid stations in complying with the rules, ALTV is publishing *The Local Television Station's Guide to the FCC's New Captioning Requirements*. The clarifications requested herein will enable stations to avoid guessing games in seeking to comply with the rules and reduce inquiries to the Commission staff concerning application and interpretation of the new rules.

telethons, which enjoy no revenue generating potential for the station, but are expensive to caption, should qualify for the exemption.

Third, an exemption or other more flexible regime should be established for home shopping programming and infomercials. Some stations feature this sort of programming during the bulk of their broadcast days. Thus, they will feel a disproportionate impact from the imposition of the new rules during the early phases of the transition. Indeed, compliance may be impossible.

Fourth, the Commission should clarify the meaning of “published” such that programming (including series) offered or sold in syndication prior to January 1, 1998, are considered pre-rule or “old” programming even if some episodes were produced after January 1, 1998. Otherwise, stations will have to treat “old” and “new” episodes of the same programming differently. This will engender confusion in attempting to comply with the rules, as well as in monitoring compliance.

Fifth, an exemption should be established for programming which cannot be broadcast in captioned form because the station edited the program. Stations ought not be penalized for editing programming. They never should face the choice of complying with the captioning requirements versus leaving material in a program considered by the licensee unsuitable for its community or audience at the time of broadcast. For stations at the margin of compliance, this is a critical concern.

Sixth, the Commission should clarify that network compensation and barter transactions are not to be included in determining a station’s eligibility for the revenue and expense cap exemptions. This interpretation is consistent with the Commission’s statements, but less than crystal clear. Therefore, clarification is in order.

Seventh, questions about application of the captioning requirements to DTV stations should be deferred. For example, if stations elect to provide multichannel DTV service, must each channel be in compliance, as would be the case under the rules as written. This may deny stations needed flexibility in transitioning to DTV. Therefore, the Commission should make conscious and informed decisions about application of the rules to DTV. In the meantime, the Commission should treat DTV with a maximum of flexibility.

Finally, by way of introduction, ALTV strongly suggests the Commission remain open to reassessment of a basic premise of its new captioning regime. ALTV is far less sanguine than the Commission appears to be that local television stations will be able to “incorporate closed captioning requirements into their contracts with producers and owners.”<sup>4</sup> As the Commission is well-aware, the end result of any negotiation typically reflects the relative bargaining power of the parties. Far too many variables determine the bargaining power of a local television station versus a program syndicator or producer for the Commission to form any realistic expectation that local stations *generally* will be able to insist that programs be captioned. ALTV, therefore, urges the Commission to remain open to alternative approaches to responsibility for captioning in the course of its future reviews of the functioning of its new captioning rules.

In the meantime, ALTV urges the Commission to revise and clarify its rules as set forth below.

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<sup>4</sup>*Report and Order* at ¶28.

## **II. STATIONS SHOULD NOT BE STRAPPED TO THE AMOUNT OF CAPTIONED PROGRAMMING THEY PREVIOUSLY HAVE PROVIDED.**

Under new §79.1(b)(3) of the Commission's rules, stations may not decrease substantially the amount of captioned programming they are providing *post-1997* versus what they were providing in the first six months of 1997. ALTV submits that this provision should be eliminated or relaxed. Otherwise, stations will be forced into the undesirable position of making programming decisions based on whether a program is captioned. For example, a station may wish to schedule a new syndicated public affairs program, which would not be captioned. It would replace a captioned syndicated half-hour off-network comedy. However, this would decrease the station's level of captioned programming below its 1997 level. Consequently, the station postpones or cancels its plans for the new public affairs program. Problems like this are more likely to occur with stations not affiliated with ABC, CBS, or NBC. Their program schedules in 1997 will have included more syndicated programming and less, presumably captioned, network programming. Again, if they wish to replace a captioned syndicated program with an uncaptioned program, based on their perception of local audience demand, they will find themselves handcuffed by the "no decrease" provision of the rules. The viewing public then must be satisfied with a program scheduled only because it was captioned, not because it reflected the station's best programming judgment.

Furthermore, this provision appears to rest on a faulty premise, namely, that programming on stations changes little from year to year. Again, for stations not affiliated with ABC, CBS, or NBC, programming changes considerably over time. Whereas affiliates of ABC, CBS, and NBC can count on full schedules of captioned network programming (thereby maintaining a constant base level of captioned programming), other local stations' program schedules are likely to have fluctuating levels of captioned programming based on their ongoing

selections of syndicated programs (which may or may not be captioned).<sup>5</sup> These stations stand to be robbed of the programming flexibility necessary to provide a responsive and competitive service.<sup>6</sup> Ironically, those which have scheduled the most captioned programming in 1997 will be the most heavily penalized in terms of lost programming discretion in the future.

Finally, the rule is unnecessary. All stations will be required to achieve the requisite bench mark levels of captioned programming. If these levels are sufficient in overall public interest terms for one station, they should be sufficient for all. If enough is enough, no reason exists to require some stations to provide more than enough. Therefore, the Commission should jettison §79.1(b)(3).

### **III. THE EXEMPTION FOR LOCALLY-PRODUCED PROGRAMMING SHOULD BE CLARIFIED SO AS NOT TO STIFLE TRADITIONAL GENRES OF PUBLIC SERVICE PROGRAMMING.**

Pursuant to new §79.1(d)(8), programming that is produced and broadcast locally by a station, which has primarily local interest and has no repeat value is exempt from the captioning requirements (except for programs readily captioned via the electronic newsroom technique ("ENR")). The FCC intends the exemption to apply only to a limited class of truly local programming such as local parade coverage, coverage of local high school or other non-

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<sup>5</sup>ALTV also reminds the Commission that affiliate switches are far from unheard of. In some instances, stations previously affiliated with ABC, CBS, or NBC, involuntarily have become independents.

<sup>6</sup>Stations bound by their prior levels of captioned programming will be handicapped in their ability to compete effectively not only against cable and other multichannel providers, but also against other stations (which will have an advantage having programmed less captioned programming in 1997).



professional sports, live, unscripted local talk shows, and community theatre productions.<sup>7</sup> ALTV urges the FCC to interpret this provision somewhat more broadly. Otherwise, as the Commission rightly fears, some very beneficial genres of essentially local programming may never be produced.

#### **A. Local Programming with Limited Repeat Value**

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ALTV urges the Commission to clarify that station-produced non-news programs remain within the exemption for “locally produced and distributed programs that are of primarily local interest, have little repeat value and have an economically fragile economic support system” if such programs are repeated on the producing station or a co-owned or operated station. For example, some stations routinely double-run local talk shows to broaden their exposure (*e.g.*, once on Saturday afternoon, once on Sunday morning). Another station occasionally may use a re-run of an especially compelling public affairs program later in the season. In neither case are such public service programs remunerative, but the community does benefit from the additional exposure of the program. Reading §79.1(d)(8) too strictly would put an end to the repeats.

Similarly, a station should not be prevented from providing a co-owned (or LMA’d) station in another market or an LMA’d station in the same market with a program considered particularly informative about an issue of local concern in both communities. Again, a narrow interpretation of the exemption would foreclose such additional exposure of worthwhile public interest programming. In each case, a station would be faced with weighing the costs of captioning the program for a repeat against the limited revenue potential of the repeat. Rarely, if ever, would the additional revenue potential begin to cover the cost of captioning. Thus, the public would be deprived of enhanced access to the program.

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<sup>7</sup>*Report and Order* at ¶158.

Therefore, the Commission should clarify that a program will not be considered networked or as having repeat value if it is double-run or occasionally re-run on the producing station (or LMA'd station in the same market) or broadcast on a co-owned station in another market. Thus, the exemption in §79.1(d)(8) would continue to apply.

## **B. Candidate Debates**

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The Commission also ought clarify that candidates' debates would be exempt under §79.1(d)(8). Whereas candidates' debates might be considered news with respect to the exemptions from the equal opportunities provision of §315 of the Communications Act, 47 U.S.C. §315, they are virtually no different from local talk shows in every regard pertinent to the captioning requirements. They are unremunerative public interest programming which would be very expensive to caption. After decades of encouraging stations to broadcast debates, the Commission should refrain from interpreting §79.1(d)(8) in a manner which could squelch scheduling of debates.

## **C. Telethons**

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Another genre of true public service programming which deserves exemption is the charitable telethon. They have no commercial purpose and are not remunerative. They are strictly vehicles for charitable fund raising. They are unscripted and live -- and, therefore, difficult and expensive to caption. Although part local and part national, confining the exemption in §79.1(d)(8) to only local programming would discourage local participation in telethons (at worst threatening their national reach) and draw funds away from the charitable purpose to pay for captioning. Charities ought be left to determine how their receipts are spent. Stations should not confront the

enormous disincentive to participate in telethons. Therefore, the Commission should clarify that telethons are exempt (even though they are in part national programs).

#### **IV. HOME SHOPPING AND INFOMERCIAL PROGRAMMING SHOULD BE SUBJECT TO AN EXEMPTION OR MORE FLEXIBLE TREATMENT.**

The Commission has provided no exemption for infomercial or home shopping programming. ALTV submits that the Commission's policy is too rigid. It fails to recognize that a considerable number of stations broadcast such programming during the bulk of their program schedules. Stations which schedule such programming as filler or during late-night hours will have considerably less difficulty in meeting the bench marks. Stations with near full-time shopping or infomercial schedules, however, likely will be hard pressed to meet the bench marks. They will face the unhappy prospect of changing their programming just to comply with the bench marks. Whether they would be able to force infomercial producers to caption programming is problematic. Similarly, home shopping programming by its nature will be difficult and expensive to caption. Like local live talk shows, it is unscripted and live. ALTV, therefore, urges the Commission to introduce some additional flexibility into the treatment of home shopping and infomercial programming, either via an exemption for such programming or for stations which devote substantial portions of their broadcast schedules to such programming.

**V. THE COMMISSION SHOULD CLARIFY THAT ALL PROGRAMMING OFFERED IN SYNDICATION OR EXHIBITED IN ANY MEDIUM BEFORE JANUARY 1, 1998, WILL BE CONSIDERED “PRE-RULE” PROGRAMMING.**

The Commission should clarify that any program or series offered in syndication prior to January 1, 1998, will be considered pre-rule programming under §79.1(a)(6)(i). The Commission has not defined “publication” as used in §79.1(a)(6)(i). However, publication, as defined in the copyright law, would include the distribution of a program (in the case of television, for purposes of exhibition), as well as the *offering* of a program for exhibition (*i.e.*, syndication). Section 101 of the Copyright Act, 17 U.S.C. §101, defines “publication” as “[T]he distribution of copies ... of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” Furthermore, according to the definition, “The *offering* to distribute copies... to a group of persons for purposes of further distribution, *public performance*, or public display, constitute publication.” 17 U.S.C. §101 [emphasis supplied]. Indeed, the Commission speaks in the rule of “publication, by any *distribution* method, which tends to confirm that the Commission contemplated treating publication as encompassing distribution. Use of the term publication at all would have made no sense if the Commission considered exhibition and publication as one in the same thing.

The use of this definition of “publication,” which includes syndication, makes good practical, as well as semantic, sense in the realm of the captioning requirements. First, it avoids the tricky compliance issue which would arise if a syndicated off-network program like *The Simpsons* were defined as “pre-rule” or “new” based on when each particular episode of the program actually was first broadcast. In the case of such ongoing network series, some programs would be pre-rule, while episodes first broadcast on or after January 1, 1998, would be considered “new.” Several years into the future, when the program may have departed the network, but still was in syndication, stations would be faced with sorting episodes as old or new, thereby complicating

their efforts to comply with the rule. Similarly, monitoring compliance would be virtually impossible. Viewers will have no means of knowing when particular episodes were first shown.

Second, any effect on the amount of captioned programming available to the public would be minimal at the very worst. Most syndicated programming already in syndication today is captioned. Even if such programs as *Seinfeld* become “evergreens” like *I Love Lucy*, they pose no threat that any meaningful amount of uncaptioned syndicated programming would remain in active syndication. Therefore, by 2008, it will be highly unlikely that any appreciable amount of uncaptioned old syndicated programming will still be in widespread use by local television stations. In short, the Commission may eliminate a wealth of confusion in achieving and monitoring compliance with a minimum of risk by clarifying the term “publication” as requested.

The Commission also should clarify that “exhibition or publication, by *any* distribution method” encompasses theatrical or home video release of a motion picture.<sup>8</sup> Again, this is fully consistent with the language of the *Report and Order* and very practical in terms of the rule’s actual application.<sup>9</sup> Only a relatively limited number of successful movies, released on the cusp prior to January, 1998, but not exhibited or distributed in video until 1998, would be affected. Furthermore, by 2008, the number of such movies successful enough to remain in use by local television stations is likely to be negligible. Therefore, the Commission should clarify §79.1(a)(6)(i) accordingly.

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<sup>8</sup>*Report and Order* at ¶60.

<sup>9</sup>This clarification appears all, but unnecessary in light of the plain meaning of the rule, as written. Nonetheless, making the clarification now will give it general release, whereas an informal ruling to an individual party in the future might remain obscure for a considerable period of time.

## **VI. EDITED PROGRAMMING WHICH CANNOT BE SHOWN IN CAPTIONED FORM SHOULD BE EXEMPT.**

Local television stations routinely edit programming, feature films in particular. Whereas editing may be required for a variety of reasons, feature films often are edited for reasons of local tastes and suitability for the audience at the time period of broadcast. These editing decisions are uniquely local and go to the heart of a local television station's obligation to be responsive to its community.

The Commission's new captioning rules create an enormous disincentive to engage in this type of editing. For a station on the margin of compliance, the desire to edit a program furnished it in captioned form places the station in a box. Three undesirable options would be available. It may edit the program and undertake the cumbersome and expensive task of reformatting the captions. It may edit the program and broadcast it without reformatting the captions, placing its compliance with the captioning requirements in peril. It may not run the program. The Commission already has sought to eliminate the third option by not requiring that stations reformat captions in edited programming, properly recognizing the economic burden on stations. However, that accommodation is largely illusory, especially for stations on the border of compliance. They will have to elect between not scheduling the program or running it unedited. This is an untenable position for a local station striving to remain competitive and faithful to its obligations as a Commission licensee.

ALTV, therefore, urges the Commission to consider locally edited programming exempt. Otherwise, the potential infringement on a station's editorial and programming judgments is palpable.

**VII. THE COMMISSION SHOULD CLARIFY THAT NETWORK COMPENSATION AND BARTER TRANSACTIONS ARE EXCLUDED IN CALCULATING REVENUE FOR PURPOSES OF THE REVENUE AND EXPENSE EXEMPTIONS.**

ALTV urges the Commission to clarify that local television stations need not include the value of network compensation or barter transactions in calculating net revenue. The FCC's reference to station-controlled inventory suggests that neither should be counted, but no specific reference to either barter transactions or network compensation appears in the FCC's explanation of the new rules.<sup>10</sup> However, the Commission clearly contemplates that network programming be treated separately. By the same token, network compensation paid to a station by a network as consideration for carrying the network's programming logically would be excluded from any calculation of local station revenues from its non-network programming. Nonetheless, clarification would allay any uncertainty.

Barter transactions, common in broadcasting, also should be excluded. Stations often buy programming from syndicators on a full or partial barter basis. The station is licensed to broadcast the program, and the syndicator is permitted to sell some of the commercial time inventory in the program. Such "barter" spots, thus, fall outside station-controlled inventory.<sup>11</sup> Therefore, they are impossible to value because the station does not sell the time itself.<sup>12</sup> ALTV,

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<sup>10</sup>*Report and Order* at ¶165.

<sup>11</sup>To the extent that stations retain some of the inventory in a syndicated show, then those revenues ought be included in calculating revenue for exemption purposes.

<sup>12</sup>The syndicator sells the spot nationally, much the same as a national network. No local break-out is involved. Valuation also is rendered more problematic because stations sometimes acquire program licenses on a cash and barter basis. The station not only provides ad inventory, but also makes a cash payment to the syndicator.

therefore, urges the Commission to clarify that barter transactions, like network compensation, should be excluded from revenue calculations for purposes of the exemptions in §79.1(d)(11) and (12).

## **VIII. PRECISE APPLICATION OF THE RULES TO DTV DESERVES FURTHER STUDY.**

The Commission wisely has indicated that it will “reexamine issues relating to digital television.”<sup>13</sup> ALTV fully concurs that precise application of the rules to DTV deserves further study. For example, assessing compliance on a per-channel basis, which appears to be an eminently sound approach *vis-a-vis* today’s multichannel video providers, may be a different matter in the context of DTV multicasting. Would this approach impose a detrimental rigidity on emerging DTV operations? These and other matters should be subject to thoughtful and informed deliberation before DTV facilities are subject to today’s rules essentially by default.

## **IX. CONCLUSION**

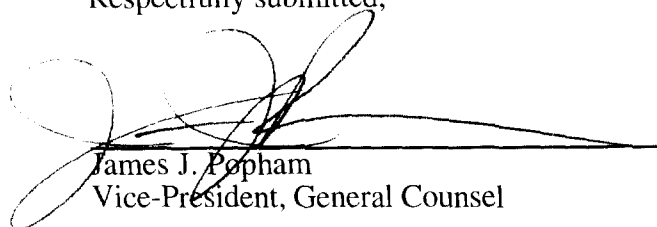
ALTV seeks primarily herein to assure that imposition of the new captioning rules in no way compromises local television stations’ abilities to make programming judgments based on their perception of the public interest in their communities. As is obvious from the above, very little “tweaking” of the rules is required. Nonetheless, even trivial incursions into a licensee’s programming judgments have consequence: the public sees a second-best service. Therefore, ALTV urges the Commission to revise and clarify its new captioning rules as herein requested.

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<sup>13</sup>*Report and Order* at ¶251.



Respectfully submitted,



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